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No. 93-823

In The

Supreme Court of the United States

October Term, 1993

STATE OF NEBRASKA, DEPARTMENT OF REVENUE,

Petitioner,

v.

JOHN LOEWENSTEIN,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Nebraska

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

As demonstrated in the Petition, the decision of the Supreme Court of Nebraska that a state tax on income derived from repurchase agreements involving federal securities violates 31 U.S.C. § 3124 is contrary to numerous decisions of courts of other states, and conflicts with decisions of this Court. Respondent argues the decision below is distinguishable from cases decided by other state courts because it is "based upon a factual determination that taxation of federal obligations subject to repurchase agreements would adversely and impermissibly affect the borrowing costs of the federal government." (Brief in Opp. at 5). Respondent also argues the Nebraska Supreme Court's decision is "consistent with this Court's decision in *American Bank & Trust Co. v. Dallas County,* 463

U.S. 855 (1983). . . . " (Brief in Opp. at 5). Respondent also suggests this Court lacks jurisdiction to grant the Petition because the decision below is assertedly a mere "advisory opinion" which does not satisfy the case or controversy requirement of Article III of the U.S. Constitution. (Brief in Opp. at 1-5). None of these contentions provide any basis for denying the Petition.

1. Respondent suggests that this Court lacks jurisdiction to grant the Petition because the decision below did not arise from an actual "case or controversy" as required by Article III of the United States Constitution. Respondent argues the Nebraska Supreme Court did nothing more than render an "advisory opinion" on a hypothetical set of facts. (Brief in Opp. at 3-4). Respondent's contentions are without merit.

Respondent brought this action challenging the validity of a ruling by the Nebraska Department of Revenue pursuant to Neb. Rev. Stat. § 84-911 (1987) (Pet. Cert. App. A-30).[1] Section 84-911(1) provides:

> The validity of any rule or regulation may be determined upon a petition for declaratory judgment thereon addressed to the district court of Lancaster County **if it appears that the rule or regulation or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner.** The agency shall be made a party to the proceeding. **The declaratory judgment shall be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule or regulation in question.** (emphasis added).

[1] Respondent erroneously refers to Neb. Rev. Stat. § 84-912 (1987), which establishes a procedure to obtain a declaratory ruling from an administrative agency as to the applicability of a rule, regulation, or statute. Respondent did not seek a declaratory ruling from the Nebraska Department of Revenue, but filed an action seeking a declaratory judgment in state district court under § 84-911. Section 84-912 is simply irrelevant.

In order to invoke the jurisdiction of the state court, Respondent alleged that, as a result of the Department's Ruling, the Department "intend[ed] to impose the Nebraska state income tax on plaintiff's dividends for 1987 received from the Trusts . . . ", and that "defendant intend[ed] to impose such a tax on any such dividends received by plaintiff in 1988 and in future years." (Pet. Cert. App. A-33). Respondent further alleged that "[a]ny imposition of an income tax by defendant upon the dividends received by plaintiff from the Trusts violate[ed] 31 U.S.C. § 3124(a) and the supremacy clause of the U.S. Constitution." (Pet. Cert. App. A-33). Respondent requested relief "declaring that dividends received by plaintiff from the Trusts are not includable within plaintiff's income for purposes of the Nebraska income tax." (Pet. Cert. App. A-33-34). The Department admitted its intent to enforce the Ruling and to impose the tax in question. (Pet. Cert. App. A-35).[2]

Respondent's challenge to the validity of the Department's Ruling plainly presented an actual case or

[2] Originally, Respondent challenged only the Department's Revenue Ruling 22-87-4. Subsequently, the parties jointly filed a motion to amend pleadings to include a request that the validity of Revenue Ruling 22-85-1 be determined. (Pet. Cert. App. A-37-38).

controversy ripe for decision by the courts below, and the decision of the Nebraska Supreme Court is subject to review by this Court. Respondent brought this action under § 84-911 to obtain a declaratory judgment as to the validity of a rule of the Department which Respondent alleged would be enforced against him and would impair or interfere with his legal rights. Respondent had a "personal stake in the outcome", thus "assur[ing] that concrete adverseness which sharpens the presentation of issues" necessary for proper resolution of the federal questions presented. *Baker v. Carr,* 369 U.S. 186, 204 (1962). Respondent also demonstrated that he "ha[d] sustained or [was] immediately in danger of sustaining some direct injury" as a result of the challenged official conduct and that the injury or threatened injury was "real and immediate," not "conjectural" or "hypothetical." *City of Los Angeles v. Lyons,* 461 U.S. 95, 102 (1983).[3]

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[3] Respondent asserts that he was not required by Petitioner to pay taxes on income from the Trusts, and that he did not do so. (Brief in Opp. at 2-3). This is directly contrary to the facts as found by the court below. *Loewenstein v. State,* 244 Neb. 82, 86, 504 N.W.2d 800, 803 (1993). ("The controversy in this case arose out of the State's taxation of income of appellee, John Loewenstein, received from investments in mutual funds."). Even absent this finding, there would be no relevance to Respondent's apparent claim that no justiciable controversy exists because certain prior tax years may be barred from assessment by Neb. Rev. Stat. § 77-2786 (Supp. 1993). The decision does impact Petitioner's ability to assess taxes for later tax years, as the court below specifically held "that the income received by the [Respondent] from repo transactions executed by the trusts involving federal securities is exempt from state taxation under § 3124." 244 Neb. at 90, 504 N.W.2d at 805.

The Nebraska Supreme Court "has repeatedly held that courts of this state are not permitted to give advisory opinions but can only declare the law and its application to a given set of facts when a justiciable controversy is presented for the determination of the court." *State ex rel. Nebraska Nurses Ass'n v. State Bd. of Nursing,* 205 Neb. 792, 798, 290 N.W.2d 453, 456 (1980). "The courts of [Nebraska] decide controversies and are not empowered to render advisory opinions." *American Fed. of S., C., and M. Emp. v. State,* 200 Neb. 171, 177, 263 N.W.2d 643, 647 (1978). The declaratory judgment rendered by the state court was based on a justiciable case or controversy as to Petitioner's taxation of income received by Respondent.

Finally, there is no merit to Respondent's claim that the requirements of the applicable jurisdictional statute, 28 U.S.C. § 1257(a), are not satisfied. This section provides for review by petition for certiorari of "[f]inal judgments or decrees rendered by the highest court of a State . . . where any title, right, privilege, or immunity is specially set up or claimed under the Constitution . . . or statutes of . . . the United States." In this case, Respondent claimed a right to immunity from state taxation under a federal statute (31 U.S.C. § 3124) and the U.S. Constitution (the Supremacy Clause). The state court's judgment falls squarely within the confines of the jurisdictional statute.

2. As to the merits, Respondent does not dispute that a conflict exists among the highest courts of several states as to whether state taxation of income derived from repurchase agreements involving federal securities violates 31 U.S.C. § 3124. Respondent does assert, however, that the Court should not grant certiorari because of the

Nebraska Supreme Court's reliance on factual determinations which Respondent claims distinguishes this case from decisions in other jurisdictions. (Brief in Opp. at 6-9). In particular, Respondent refers to the assertedly "undisputed expert testimony" of Peter D. Sternlight cited by the majority below. (Brief in Opp. at 9).

The evidence presented in the proceedings below, in addition to those facts stipulated by the parties, consisted primarily of depositions of Stewart Brown, a financial analyst and university professor, and Peter Sternlight, executive vice president of the Federal Reserve Bank in New York. 244 Neb. at 86, 504 N.W.2d at 803. These depositions were part of the evidence before the Florida court in *Department of Revenue v. Page*, 541 So. 2d 1270 (Fla. Dist. Ct. App. 1989), which involved the same issue litigated ~~in~~ the court below. 244 Neb. at 86, 504 N.W.2d at 803. In *Page*, the Florida court, having before it virtually the same evidence presented in this case, held that the state was **not** precluded from taxing income from shares in the Trusts derived from repurchase agreements. 541 So. 2d at 1275. Thus, not only is the decision of the court below contrary to numerous state court decisions which have rejected claims that the exemption from taxation of federal obligations under § 3124 precluded state taxation of income from repurchase transactions, it is at odds with at least one state court decision which involved virtually the same evidentiary record presented in this case. Respondent's proffered "factual distinction" provides no basis for the Court to decline to grant the petition.

Moreover, Respondent is plainly incorrect in characterizing the deposition testimony of Mr. Sternlight as "undisputed expert testimony." The decision below

recounts that Mr. Brown "testified that the economic substance of a repurchase transaction is a secured loan . . . ", and "that the Federal Reserve could still conduct open-market operations in essentially the same way without repurchase agreements." 244 Neb. at 86, 504 N.W.2d at 803. Thus, it cannot be said that Mr. Sternlight's testimony was in any sense "undisputed."

3. Finally, Respondent argues that the decision below is consistent with this Court's decisions interpreting the scope of the immunity provided under § 3124, citing specifically the Court's decision in *American Bank and Trust Co. v. Dallas County*, 463 U.S. 855 (1983). (Brief in Opp. at 10). Respondent wholly ignores the Court's later decision in *Rockford Life Ins. Co. v. Illinois Dep't. of Revenue*, 482 U.S. 182 (1987). In *Rockford Life*, the Court held that only those instruments which constituted "direct [ ]or certain obligations of the United States" which the United States bore "the primary obligation to make timely payments" on were immune under § 3124. *Id.* at 188. As noted in the Petition, there is no direct and certain obligation of the United States government to the Trusts under the repurchase agreements. The agreements, by their terms, specify that the Trusts will not receive the monies promised by the federal government in the securities which are the subject of the repurchase transaction. The federal government never receives the proceeds of repurchase transactions. The proceeds flow between private parties, the underlying obligations already having been issued at the time the repurchase transaction takes place. Under the reasoning of the Court in *Rockford Life*,

state taxation of income from repurchase transactions is not contrary to 31 U.S.C. § 3124.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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